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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 1025

HENRY A. BERLINER, JOSEPHINE M. BERLINER, ROBERT B. FRANK AS TRUSTEE FOR CORA ANNE B. CUNNINGHAM, JOSEPHINE L. B. VARGAS AND HENRY A. BERLINER, JR.,
*Petitioners,*

v.

DISTRICT OF COLUMBIA,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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### COUNTER STATEMENT OF THE CASE

In 1937 petitioners acquired, at a cost of $100 per share, common stock in a Maryland corporation known as Engineering and Research Corporation (hereinafter called ERCO). The total sales of shares of common stock issued by the corporation was 100, of which petitioners owned 90, and one Lester Wells, who is not a party to this proceeding, owned 10 (R. 5, 22). On November 8, 1954, ERCO entered into a contract with ACF Industries, Inc., a New

Jersey corporation (hereinafter called ACF) to sell to ACF all of ERCO's assets and business for the sum of $3,000,000 which was to include the market value of ten thousand shares of $25.00 par value full paid and non-assessable common stock of ACF to be computed on the basis of the closing price of that stock on the New York Stock Exchange on the last business day upon which that stock should be sold on the exchange immediately preceding the contract closing. On November 15, 1954, pursuant to the contract of November 8, 1954, ERCO consummated the sale of its business and assets to ACF Industries (R. 12, 22). Thereafter, ERCO conducted no business, and carried on no activities except those incident to its liquidation and dissolution (R. 23). At the time of the sale on November 15, 1954, ERCO had earned surplus on its books of $613,628.54 and capital stock of $190,000.00 of which $180,000.00 was represented by preferred stock and the remainder by the common stock held by petitioners and Wells (R. 25-26). Following the sale by ERCO to ACF on November 26, 1954, ERCO adopted a resolution directing the officers of ERCO to distribute, before January 1, 1955, to the stockholders of ERCO, all of its assets except an amount retained to meet claims. This resolution also authorized the officers of ERCO, as soon as practicable, to proceed with the dissolution of ERCO. On December 9, 1954 and December 21, 1954, ERCO, pursuant to resolutions of its board of directors and stockholders, distributed pro rata to petitioners and to Wells the assets of ERCO consisting of cash and the 10,000 shares of stock in ACF (R. 7, 23). On December 27, 1954, following the distribution to the shareholders of all of the assets of ERCO, ERCO was dissolved (R. 7, 25). The profit realized by ERCO on the sale of its assets to ACF was $2,196,376.46, which was reflected in ERCO's books as earned surplus. ERCO's 1954 Federal income tax return reported the distributions made by it to its stockholders following the sale as distributions out of earned surplus (R. 25-26, 9, 19). The total amounts distributed to

petitioners, exclusive of the amounts received by Lester Wells, was $2,312,248.50, including the cash value of ACF stock also distributed to petitioners. Of this amount, $9,000.00 represented a return of capital for the common stock held by petitioners, and the remainder was paid and delivered out of the earned surplus of ERCO acquired from its operations to November 15, 1954, and the proceeds of sale of ERCO's business to ACF Industries (R. 10, 24).

Section 4(m), Article I, Title I of the District of Columbia Income and Franchise Tax Act of 1947, as amended, 61 Stat. 328, ch. 258 (Section 47-1551c(m), D. C. Code, 1951), defines, for District of Columbia individual income tax purposes, a dividend as:

> "* * * any distribution made by a corporation (domestic or foreign) to its stockholders or members, *out of its earnings, profits, or surplus* (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property * * * and whether distributed *prior to, during, upon, or after liquidation or dissolution of the corporation*: * * *". (Italics supplied)

Section 2, Article I, Title III of the District of Columbia Income and Franchise Tax Act of 1947, *supra*, (Section 47-1557a(a), D. C. Code, 1951) specifies that for the purposes of the Income and Franchise Tax Act gross income includes "dividends * * * or gains or profits, and income derived from any source whatever".

Based upon the provisions of the District Income Tax Act, petitioners were assessed and paid District of Columbia individual income taxes upon the amounts distributed to them by ERCO, exclusive of the return of capital as represented by the common and preferred stock. Thereafter, petitioners appealed to the District of Columbia Tax Court alleging there that the assessments of individual income taxes against them were invalid (R. 26, 27). That

court affirmed the assessments of taxes against petitioners and held that they were not entitled to refunds of those taxes (R. 27-53). The United States Court of Appeals for the District of Columbia Circuit, to which petitioners appealed from the decisions of the Tax Court against them, affirmed the Tax Court's decisions (R. 72).

## SUMMARY OF ARGUMENT

**The statute involved in this case is limited to the District of Columbia and does not present a question of sufficient importance to justify a modification of the position of this Court that it will not, except in extraordinary cases, review decisions of the United States Court of Appeals for the District of Columbia Circuit based upon statutes limited to the District of Columbia.**

**Contrary to the position of petitioners, the District statute which petitioners attack accords with the due process requirement of the Fifth Amendment to the Constitution, and contains language substantially equivalent to language in Federal Revenue Acts considered and approved in numerous cases by Federal Circuit Courts of Appeal.**

## ARGUMENT

### The Petition Should Be Denied

This case involves the liability of petitioners for an individual income tax under the District of Columbia Income and Franchise Tax Act, of 1947, as amended (61 Stat. 328, ch. 258), a statute which, although enacted by the Congress of the United States, is limited in its operation to the District of Columbia. Ordinarily, as this Court has stated, this Court will not review decisions of the United States Court of Appeals for the District of Columbia which are based upon statutes limited in their operation and effect to the District of Columbia. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

Petitioners paid a District of Columbia individual income tax upon earned surplus distributed to petitioners by Engi-

neering and Research Corporation in which petitioners owned stock. The United States Court of Appeals for the District of Columbia Circuit, in an extensive opinion, concluded that the tax paid by petitioners was properly assessed against petitioners under the District of Columbia Income and Franchise Tax Act of 1947, *supra*, and that objections raised by petitioners to the tax on the basis of the Fifth Amendment could not be sustained. In reaching its conclusions, the Court of Appeals compared the District's statute with substantially identical provisions in Federal statutes enacted by the Congress for the purposes of Federal revenues and said: "It was constitutionally open to Congress to elect to tax the profit as a dividend for purposes of the District tax, just as it was constitutional for it to do so for purposes of the 1921 Federal Act. * * *". (R. 54, 63).

Petitioners cite *Lynch* v. *Turrish*, 247 U. S. 221, and *Lynch* v. *Hornby*, 247 U. S. 339, in support of their contention that receipt of proceeds of liquidation from a corporation does not constitute receipt of a dividend (Pet. for Cert. 11). But both of these cases were considered by the United States Court of Appeals in reaching its decision and that Court rejected the contentions of petitioners for the reason that *Lynch* v. *Hornby* and *Lynch* v. *Turrish* involved language in the Revenue Act of 1913, 38 Stat. 167, different from that contained in the District of Columbia Income and Franchise Tax Act of 1947. Thus, the construction by this Court of the Revenue Act of 1913 in the cases cited is not applicable. (R. 58). Moreover, as the Court of Appeals observed, it was uniformly held by the courts in construing the Internal Revenue Act of 1921 that the general definition of a dividend, as contained in that act, included the distributions of earnings in a liquidation, just as does the District of Columbia Income and Franchise Tax Act of 1947. (R. 59-60) The fact that the District Tax Act specifically includes, as dividends, distributions in liquidation, was considered significant by that Court, It stated:

> "* * * Had Congress intended that such a distribution be treated as an exchange, we think it would have omitted the reference to liquidating distributions in the definition of a dividend and would have included a provision similar to that which has appeared in the Federal statutes uninterruptedly since 1924." (R. 60-61)

Petitioners urge that the imposition of the taxes here in question is prohibited by the Fifth Amendment. This amendment, and not the Fourteenth, is applicable in the District of Columbia. *Wight* v. *Davidson*, 181 U. S. 371. A claim of unreasonable classification or inequality in the incidence or application of a tax does not raise a question under the Fifth Amendment. *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463.

Even if the due process clause of the Fifth Amendment could be invoked, the discrimination complained of would have to be extreme or devoid of a reasonable basis. *Detroit Bank* v. *United States*, 317 U. S. 329; *Steward Machine Co.* v. *Davis*, 301 U. S. 548. No such showing, as the Court of Appeals held, is made by petitioners here.

## CONCLUSION

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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